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The Antitrust Treble Damages Remedy

THE ANTITRUST TREBLE DAMAGES REMEDY

A party injured as a consequence of an antitrust violation may recover three times his actual damages. The treble damage remedy has been attacked because it does not return value to consumers who pay higher prices for the lower quality goods which results from monopolistic practices. Rather the remedy could result in a windfall for an injured plaintiff. This Note examines the criticisms and benefits of the treble damage remedy and concludes that the remedy provides a valuable incentive for the most effective antitrust violation deterrent—the private attorney general.

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I. INTRODUCTION

The private plaintiff may soon lose incentive to sue for redress under the antitrust laws. Under the Sherman Act of 1890,[1] Congress granted an injured private plaintiff the right to institute an antitrust lawsuit.[2] To compensate and encourage the injured plaintiff to enforce antitrust laws,

1. Ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1982)).

2. Clayton Act of 1914, § 4, Pub. L. No. 323, 38 Stat. 731 (codified at 15 U.S.C. § 15 (1982)); *see infra* note 4. Section 4 superseded § 7 of the Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890), and § 77 of the Wilson Tariff Act, ch. 349, § 77, 28 Stat. 570 (1894). "Antitrust laws" refers only to those Acts defined in § 1 of the Clayton Act of 1914, 15 U.S.C. § 12 (1982), which includes the Sherman Act, 15 U.S.C. §§ 1-7 (1982), the Wilson Tariff Act, 15 U.S.C. §§ 8-11 (1982), and the Clayton Act, 15 U.S.C. §§ 12-27, 44 (1982). The phrase includes § 2 of the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 21a (1982), but not §§ 3 & 4, 15 U.S.C. §§ 13b-c (1982). *See* Safeway Stores, Inc. v. Vance, 355 U.S. 389, 389-90 (1958) (private action may be maintained for unlawful price discriminations violative of § 2 of the Clayton Act, as amended by the Robinson-Patman Act, but not for sales at unreasonably low prices which violate § 3 of the Robinson-Patman Act); Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 376-82 (1958). Private plaintiffs have been denied an antitrust cause of action under §§ 5, 12, and 14 of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52, 54 (1982). *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973) (class action not allowed against manufacturer of non-prescription drugs for alleged false advertising).

Congress provided in the Sherman Act and in the Clayton Act of 1914[3] that the successful private plaintiff automatically receive threefold the amount of damages for the injury he sustained, plus attorneys' fees and costs.[4] Armed with treble damages, the private plaintiff has become the primary enforcer of antitrust laws.[5] Recent trends indicate, however, that Congress and the Justice Department favor the removal of restrictions on business enterprises, including reducing the use of antitrust laws to regulate business practices.[6] To discourage proliferating antitrust litigation, Congress may diminish the plaintiff's generous incentive, the treble damage remedy.

Treble antitrust damages have been criticized in the past and are vul-

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3. Ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27, 44 (1982)).

4. 15 U.S.C. § 15(a) (1982).

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, *and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.*

Id. (emphasis added).

5. Loevinger, *Private Action—The Strongest Pillar of Antitrust,* 3 ANTITRUST BULL. 167 (1958). The Justice Department, Federal Trade Commission, and state attorneys general are the other major enforcers of antitrust law. The Justice Department has exclusive jurisdiction within the government to enforce the Sherman Act. P. MARCUS, ANTITRUST LAW AND PRACTICE § 21 (1980). The Federal Trade Commission and the Justice Department may enforce sections of the Clayton Act. The FTC's jurisdiction, however, is superseded in some areas by other federal agencies. P. AREEDA, ANTITRUST ANALYSIS ¶ 158 n.62 (3d ed. 1981). The Justice Department sometimes intervenes in hearings before federal agencies. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 240 (1977). It also assists state attorneys general and their staffs. *See* P. MARCUS, *supra* § 23.

6. Sims & Lawlor, *Treble Damage Remedy Deserves Re-examination,* Legal Times of Wash., Oct. 26, 1981, at 40, col. 1. Antitrust law has been undergoing substantial review and refinement. *See* Garvey, *Report of Consultant to House Judiciary Committee on His Study of the Treble Damage Remedy,* [Mar.] ANTITRUST OF TRADE REG. REP. (BNA) No. 1154, at 356 (Mar. 1, 1984). For example, various bills that were before the 97th Congress would have altered the present application of antitrust laws substantially. *See, e.g.,* H.R. 5789, 97th Cong., 2d Sess. (1982) (to extend antitrust immunity for U.S. oil companies); H.R. 2812, 97th Cong., 2d Sess. (1982) (to limit the circumstances where foreign governments could sue under the antitrust laws); H.R. 5794, 97th Cong., 2d Sess. (1982) (to establish a right of contribution to damages); H.R. 5246, 97th Cong., 1st Sess. (1981) (to remove statutory limitations upon the application of the Sherman Act to labor organizations); H.R. 5235, 97th Cong., 1st Sess. (1981) (to amend the Sherman Act, the Clayton Act, and the Federal Trade Commission Act to exclude from prosecution certain conduct involving exports). President Reagan's former head of the Justice Department's Antitrust Division, William Baxter, saw the Department's role as public enforcer differently from previous administrations. Baxter did not favor, for example, challenging vertical and conglomerate mergers. *See* Vilkin, *DOJ Antitrust Nominee Shows Conservative Colors,* Legal Times of Wash., Mar. 23, 1981, at 8, col. 1. Baxter favors changing the treble damage remedy. *Antitrust Chief Seeks Review of Trust Law that Triples Awards,* Wall St. J., Apr. 6, 1981, at 46, col. 4. *See generally* Taylor & Crock, *Reagan Team Believes Antitrust Legislation Hurts Big Business,* Wall St. J., July 8, 1981, at 1, col. 1.

nerable to attack. After reviewing the legislative background,[7] recent criticism,[8] and proposed alternatives,[9] this Note concludes that the treble damage remedy withstands condemnation and serves as a worthwhile inducement for private plaintiffs to enforce the antitrust laws.[10]

This Note responds to criticism of the treble damage award by demonstrating that the treble damage award is insubstantial, or that the treble damage award has benefits outweighing proven deficiencies. First, this Note responds to allegations that the treble damage remedy is inefficient, complex, ineffective, and limits substantive legal development. Second, the treble damage remedy, as an integral component of private antitrust lawsuits, is discussed within a broad framework encompassing other elements contributing to or working against the success of private antitrust actions. Finally, this Note reviews some alternatives to the treble damage remedy. Although these alternatives address some deficiencies of the treble damage remedy, they create other difficulties, including an increase in the complexity of antitrust litigation.

II. BACKGROUND TO PRIVATE TREBLE DAMAGE LITIGATION

In the debates prior to the enactment of the Sherman and Clayton Acts, congressmen did not vociferate major policy concerns regarding the treble damage remedy. A congressional purpose underlying private treble damage action nevertheless is evident. The debates suggest that Congress intended to aid and compensate individuals who were injured by anticompetitive behavior as well as to induce private action to enforce antitrust laws.[11] Congress sought primarily to promote competition in the United States under the Sherman Act.[12] The Act was passed at a

7. *See infra* notes 11-22 and accompanying text.
8. *See infra* notes 31-58 and accompanying text.
9. *See infra* notes 95-116 and accompanying text.
10. *See infra* note 117 and accompanying text.
11. *See infra* notes 15-19 and accompanying text.
12. In Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), Justice Black stated:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic and social institutions . . . the policy unequivocally laid down by the Act is competition.

356 U.S. at 4; *see* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110-11 (1980); Exxon Corp. v. Governor of Md., 437 U.S. 117, 133 (1978); Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972); Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940); American Column & Lumber Co. v. United States, 257 U.S. 377, 400 (1921); United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1364 (5th Cir. 1980); Greyhound Computer Corp. v. International Business Mach., 559 F.2d 488, 504 n.37 (9th Cir. 1977), *cert. denied,* 434 U.S. 1040 (1978); Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466, 468 (8th Cir. 1976), *cert. denied,* 433 U.S. 914 (1977); George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 29 (1st Cir.), *cert. denied,* 400 U.S. 850 (1970); Al-

time when combinations of corporate organizations, known as trusts, were growing geometrically, accumulating wealth, and exerting power to oppress individual competitors.[13] In the view of congressmen who provided a cause of action for private plaintiffs in section 7 of the Act, strong competition depended on vigorous enforcement of antitrust laws.[14] En-

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brecht v. Herald Co., 367 F.2d 517, 522 (8th Cir. 1966), *rev'd on other grounds,* 390 U.S. 145 (1968); Kansas City Star Co. v. United States, 240 F.2d 643, 658 (8th Cir.), *cert. denied,* 354 U.S. 923 (1957); Balough's of Coral Gables, Inc. v. Getz, 510 F. Supp. 741, 745 (S.D. Fla. 1981); National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 498 F. Supp. 991, 1005 (E.D. Pa. 1980); United States v. American Tel. & Tel. Co., 461 F. Supp. 1314, 1321 n.20 (D.D.C. 1978); Murphy Tugboat Co. v. Crowley, 454 F. Supp. 847, 852-53 (N.D. Cal. 1978); *see also* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 19-20 (1979) ("inquiry must focus on whether the effect and, . . . purpose of the [challenged] practice are to threaten the proper operation of our predominantly free-market economy . . . [by always restricting] competition and decreasing output, . . . or instead designed to 'increase economic efficiency' "); Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 647 n.5 (1977) (Stevens, J., dissenting); United States v. Topco Assoc., 405 U.S. 596, 610 (1972); United States v. American Linseed Oil Co., 262 U.S. 371, 388-89 (1923) (Sherman Antitrust Act intended to secure equality of opportunity and protect public against evils commonly incident to monopolies); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (true test of legality is whether restraint promotes or suppresses competition); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 610 (1914) (examines purposes of acts to discern injurious restraint of trade); Feddersen Motors, Inc. v. Ward, 180 F.2d 519, 521 (10th Cir. 1950) (primary purpose is to prevent undue restraints of interstate commerce); Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 511 F. Supp. 509, 520 (E.D. La. 1981) (aimed at business combinations not unions); Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 451 (S.D. Ohio 1980) (test is whether effect fosters competition). The phrase "full and free competition" appeared in an early draft of the Sherman Act. 19 CONG. REC. 7513 (1888); *see* 21 CONG. REC. 2461 (1890) (statement of Sen. Sherman). *See generally* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 103-13 (1978); R. BORK, THE ANTITRUST PARADOX 50-71 (1978); 1 E. KINTNER, FEDERAL ANTITRUST LAW § 4.18 (1980); Dewey, *The Economic Theory Of Antitrust: Science Or Religion?,* 50 VA. L. REV. 413, 434 (1964); Elzinga, *The Goals Of Antitrust: Other Than Competition and Efficiency, What Else Counts?,* 125 U. PA. L. REV. 1191, 1194-1203 (1977); Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust,* 127 U. PA. L. REV. 1076, 1080 (1979). For a review of the legislative history of the Sherman Act, see 1 E. KINTNER, *supra* §§ 4.1-.18; 1 J. TOULMIN, A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES §§ 1.1-.19 (1949). For a chronology of events and transcripts of legislative debates, see 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 37-363 (E. Kintner ed. 1978) [hereinafter cited as ANTITRUST LEGISLATIVE HISTORY].

13. Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911); 20 CONG. REC. 1457 (1889) (statement of Sen. Jones).

> The growth of these commercial monsters called trusts in the last few years has become appalling. . . . having been allowed to grow and fatten upon the public, their success is an example of evil that has excited the greed and conscienceless rapacity of commercial sharks until in schools they are to be found now in every branch of trade, preying upon every industry, and by their unholy combinations robbing their victims, the general public, in defiance of every principle of law or morals.

Id.; see also 20 CONG. REC. 1458 (1889) (statement of Sen. George).

14. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).

forcement depended, in part, upon provisions in the legislation that induced private plaintiffs to bring lawsuits.

Congressmen were also concerned with compensation of plaintiffs. One senator, for example, described multiple damages as "a civil remedy for damage done," rather than a provision for penalizing wrongdoers.[15] Sympathy was expressed in senatorial speeches about individual victims of monopolistic behavior who faced great difficulty in suing the big trusts for redress.[16] Senator Sherman concluded that "[I]t is *important to citizens that they should have some remedy* in a court of general jurisdiction in the United States to sue for and recover the damages they have suffered."[17] Consequently, Congress provided for tripling the amount of damages, instead of doubling or merely recovering full consideration, as earlier drafts had provided.[18] Representative Webb's famous summation of section 4 of the Clayton Act, which provides for treble damages, is further evidence of intent to compensate injured individuals. "This section opens the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and gives the injured party ample damages for the wrong suffered."[19]

In addition, Congress sought to induce private lawsuits by minimizing the difficulty of obtaining the private treble damage remedy by allowing plaintiffs to sue in federal courts. For example, the amount in controversy requirement was removed.[20] Senator Sherman thought that the federal court's broad jurisdiction and authority to subpoena witnesses throughout the nation would greatly assist private plaintiffs.[21] Under the Clayton Act of 1914, Congress added provisions that allowed judgments in successful governmental suits to provide prima facie evidence of violations in private suits, and permitted injunctions to issue in private suits.[22]

The broad class of permissible plaintiffs, including any person injured in his business or property, coupled with the inducements to sue in federal courts, reflect a policy of deterring antitrust violators by providing incentives to private parties to enforce the laws.

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15. *See* 21 CONG. REC. 3147 (1890).

16. *Id.* at 1768 (statement of Sen. George); *id.* at 2468 (statement of Sen. Hiscock); *id.* at 2612 (statement of Sen. Reagan); *id.* at 2615 (statement of Sen. Coke); *see also* 51 CONG. REC. 9073 (1914) (statement of Rep. Webb); *id.* at 9079 (statement of Rep. Volstead).

17. 21 CONG. REC. 2569 (1890).

18. SENATE COMMITTEE OF FINANCE REPORT ON S.1, 51st Cong., 1st Sess. (1890) *reprinted in,* 1 ANTITRUST LEGISLATIVE HISTORY, *supra* note 12, at 93. Treble damages appeared much earlier in the English Statute of Monopolies, 21 Jac. I, ch. 3 (1624): "Every such pson and psons which shalbe soe hindred greeved disturbed or disquieted . . . shall recover three tymes so much as the damages which he or they systeyned." *Id.*

19. 51 CONG. REC. 9073 (1914).

20. Clayton Act, § 4, 15 U.S.C. § 15 (1982) (quoted *supra* note 4).

21. 21 CONG. REC. 2569 (1890).

22. *See* Clayton Act of 1914, § 5, 15 U.S.C. § 16(a) (1982).

The United States Supreme Court has supported the congressional purpose in decisions involving private antitrust litigants.[23] Federal courts, however, have restricted the class of private plaintiffs by requiring potential plaintiffs to establish standing to sue before granting entry to the judicial system.[24] The courts have based this restriction on section 4 of the Clayton Act, which requires a plaintiff to suffer an injury to "business or property, by reason of" acts forbidden in the antitrust laws.[25] Court decisions have construed section 4 to require a showing by plaintiff that he has suffered pecuniary damage to a commercial interest[26] that is causally related to a violation of antitrust laws.[27]

The lower courts developed over the years two primary tests for antitrust plaintiffs: the "direct injury" test and the "target area" test. The direct injury test is the most restrictive; it limits standing to the "first party to purchase a product that has been affected by a violation . . . [barring] all others."[28] The target area test is less restrictive; it permits anyone within a sector of the economy where illegal activity has been directed to bring a suit.[29] Circuit courts use either the direct injury test or the target area test, but not both. The differing applications of standing tests among the circuit courts has led one writer to recommend that a

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23. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

> [T]reble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed. It nevertheless is true that the treble damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy.

Id. at 485-86; *see also* Pfizer, Inc. v. Government of India, 434 U.S. 308, 314 (1978); Illinois Brick Co. v. Illinois, 431 U.S 720, 745-46 (1977); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969); Fortner Enter., Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

24. For a background on antitrust standing, see 2 P. AREEDA & D. TURNER, *supra* note 12, ¶ 333-42; P. MARCUS, *supra* note 5, § 105; L. SULLIVAN, *supra* note 5, § 247; Tyler, *Private Antitrust Litigation: The Problem of Standing,* 49 U. COLO. L. REV. 269 (1978); Note, *Third Circuit's "Functional Analysis": Patrolling the Portals to Treble Damage Actions Brought Under Section 4 of the Clayton Act,* 21 B.C.L. REV. 659 (1980) [hereinafter cited as *Third Circuit's Function and Analysis*]; Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act,* 64 COLUM. L. REV. 570 (1964); Note, *Standing to Sue in Private Antitrust Litigation: Circuits in Conflict,* 10 IND. L. REV. 532 (1977) [hereinafter cited as *Standing to Sue*]; Comment, *Advancing Consumer Standing Under Section 4 of the Clayton Act,* 32 U. FLA. L. REV. 334 (1980).

25. 35 OHIO ST. L.J. 723 (1974). Antitrust standing imposes restrictions in addition to the traditional requirements of constitutional standing because plaintiff usually will already have alleged injury in fact. *See, Third Circuit's Function and Analysis, supra* note 24, at 663.

26. Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972).

27. 35 OHIO ST. L.J. 723, 728 (1974).

28. Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910).

29. Conference of Studio Unions v. Lowes's, Inc., 193 F.2d 51 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952).

plaintiff choose his forum carefully.[30]

III. CRITICISM OF THE TREBLE DAMAGE REMEDY

Legal scholars over the years have criticized the treble damage remedy.[31] Some of the criticism is directed generally at private antitrust actions. For example, one federal judge viewed the creation of private antitrust litigation incentives as an attempt by government to shirk its own law enforcement responsibility by farming it out to an army of private litigants.[32] Many critics question whether the remedy compensates plaintiffs and deters violators, or serves the overriding policy goal of encouraging competition.[33]

A major criticism is that the remedy is not efficient. The promotion of competition encompasses several underlying policy objectives. One economic objective is to reach the optimal level of consumer welfare through efficient use and allocation of scarce resources.[34] In an efficient economy, "no rearrangement of inputs, outputs, and distribution is possible which would make someone better off in terms of his own preferences without making someone else worse off in terms of his."[35] For example, when a monopolist increases prices and restricts production, he becomes wealthier, yet consumers pay higher prices for less satisfactory goods while society's productive resources are underutilized. The later effects may be referred to as social costs or negative social welfare effects. Efficiency requires rearranging production and distribution in a way that creates the best utilization of resources for the betterment of social welfare, thereby maximizing the wealth of consumers and producers.[36]

Efficiency laid the groundwork for the reanalysis of certain types of anticompetitive behavior, such as price discrimination and vertical mergers. In some circumstances this anticompetitive behavior may not have a negative impact.[37] Nonetheless, efficiency sometimes conflicts with other policy objectives, such as dispersing wealth, limiting business size, broadening entrepreneurial opportunities, and generally decentralizing the business structure of the American economy, thought to promote

30. *Standing to Sue, supra* note 24, at 555.

31. *See* Garvey, *supra* note 6, at 356.

32. "If the law is just, it should be justly and rigorously enforced by government agents. Government should not attempt to escape its responsibility by farming out its responsibility to others who assume such responsibility for their own profit." J. BURNS, A STUDY OF THE ANTITRUST LAWS 29-30 (1976) (quoting a federal judge who responded to a survey of views on the antitrust laws).

33. *See* Garvey, *supra* note 6, at 356.

34. 1 P. AREEDA & D. TURNER, *supra* note 12, ¶ 103.

35. P. AREEDA, *supra* note 5, ¶ 108.

36. *See infra* note 41 and accompanying text.

37. *See* P. AREEDA, *supra* note 5, ¶ 218 (vertical integration can operate to save resources and reduce transaction costs); *id.* at ¶ 429 (price discrimination may increase output).

competition.[38]

Since an economic approach reorders efficiency the substantive considerations of antitrust laws, logically it would redefine the nature of a remedy for private plaintiffs. The grounds for this contention lie in *Brunswick Corp. v. Pueblo Bowl-O-Mat.*[39] In *Brunswick,* the United States Supreme Court stated:

> Plaintiff must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.[40]

In the substantive sense, antitrust injury means that plaintiff should not recover unless he can relate his injury to "anticompetitive effects." Efficiency analysis is appropriate here because it ascertains the anticompetitive effects of monopoly in terms of social welfare costs.

Antitrust law has a strong justification for combating monopoly based on economic efficiency. At a high monopoly price, consumers pay more for goods when industry's output is less. The payment of the higher price increases the transfer of wealth from consumers to monopolists. More importantly, the changes in industrial output as consumers turn to purchases of cheaper, less satisfactory goods cause inefficient use of productive resources, or deadweight loss. This loss is known as "social cost" and has a negative effect on social welfare.[41]

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38. 1 P. AREEDA & D. TURNER, *supra* note 12. *See generally* L. SULLIVAN, *supra* note 5, § 2.

39. 429 U.S. 477 (1977).

40. *Id.* at 489; *see also* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.' "). *See generally* Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986 (9th Cir. 1979), *cert. denied,* 444 U.S. 1025 (1980); John Lenore & Co. v. Olympic Brewing Co., 550 F.2d 495 (10th Cir. 1977); Chatham Brass Co. v. Honeywell, Inc., 512 F. Supp. 108 (S.D.N.Y. 1981); *In re* Data General Corp. Antitrust Litigation, 490 F. Supp. 1089 (N.D. Cal. 1980); Knutson v. Daily Review, Inc., 468 F. Supp. 226 (N.D. Cal. 1979).

41. Competition for profits enhances social welfare by forcing industry to produce what the consumer wants and to use the least amount of resources. A profit-maximizing firm increases production of goods as long as the last unit, i.e., the marginal unit of production, increases the firm's profits. This occurs if the marginal unit adds more to revenues than it does to costs. Stated another way, as long as the marginal revenue exceeds or equals marginal cost, profits increase. The monopolist, however, differs from the competitive seller in the maximization of profit through sales. For the competitive seller, marginal revenue is the same at all output levels, and always equal to the market price. His output decision has no impact on price since other sellers will cover his underproduction. He will increase his output until the marginal cost of producing the last unit equals the market price at which he can sell all his output. In the monopolist's market, the firm controls price and output. If a single price is charged, every expansion of output reduces average revenue and, as a result, the last unit sold produces less revenue than the preceding sale. The monopolist chooses between a high selling price with fewer sales or a lower price with greater sales. Thus, contrary to the competitive model, the monopolist increases profits by restricting output and setting prices above marginal cost. He contrives a shortage to raise

In private treble damage litigation, however, the remedy is measured by an individual plaintiff's injury, typically in lost profits or the estimated value of his business. The value of the loss is multiplied threefold. Since the award may in some circumstances bear little relation to negative social welfare effects, it may undercorrect or overcorrect the loss compared to the total cost to society. Furthermore, the multiple of damages for efficiency purposes is not based upon the degree of difficulty associated with detecting a violation. Therefore, the present section 4 remedy neither efficiently corrects nor efficiently deters antitrust violations.[42] If private plaintiffs are to promote economic efficiency, the award received should approximate the efficiency loss and the multiple must efficiently deter. If the award is excessive, as treble damages are alleged to be, then firms will not engage in behavior that may result in antitrust litigation, even if that behavior has a net beneficial effect on social welfare.[43]

Redefining a civil remedy under an efficiency analysis involves several

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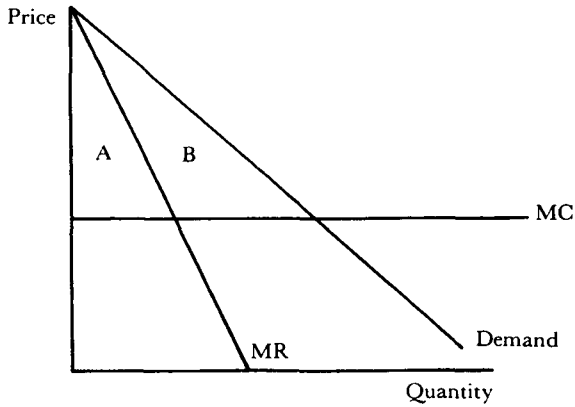
prices and maximize personal gain. The behavior of the monopolist has serious and inefficient effects. Monopoly pricing leads to "deadweight welfare loss" representing the decrease in human satisfaction to those consumers who at the competitive price would buy the product but who at the monopoly price, do not, or purchase other, less satisfactory, substitutes. Society becomes poorer because reserves in the economy are used more productively in the industry that does not restrict output. *See* 1 P. AREEDA & D. TURNER, *supra* note 12, ¶ 114; R. BORK, *supra* note 12, at 90-110; R. POSNER, ECONOMIC ANALYSIS OF LAW ¶¶ 9.1-.3 (2d ed. 1977).



The graph above illustrates the monopolist's pricing perspective. The monopolist's profit is area A, representing sales of goods above marginal cost (MC), but below marginal revenue (MR). The "deadweight loss" is represented by area B, and illustrates those goods not produced up to marginal cost even though demand dictates production of a greater quantity. *See* R. POSNER & F. EASTERBROOK, ANTITRUST 549-50 (2d ed. 1981).

42. *See* Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury,* 47 U. CHI. L. REV. 467, 476 (1980); Note, *Rethinking Antitrust Damages,* 33 STAN. L. REV. 329, 340 n.44 (1981). *See generally* R. POSNER & F. EASTERBROOK, *supra* note 41, at 549-53.

43. Page, *supra* note 42, at 472.

radical changes. First, a plaintiff would not be allowed to recover damages unless his injury relates to an inefficient social cost.[44] Second, the remedy should not compensate the plaintiff for more than is necessary to correct inefficiency.[45] Third, the federal court should deter antitrust law violators by multiplying damages, not threefold, but according to a degree of the probability of apprehension.[46] Therefore, an efficient remedy corrects the cost of inefficient behavior while incidentally providing an efficient deterrence.

Other inefficient costs arise from the availability of the treble damage remedy. First, a private plaintiff has little incentive to mitigate his injury or litigation costs because of his ability to recover treble damages.[47] In fact, the plaintiff has an incentive to accumulate damages in order to maximize his recovery. Second, the plaintiff will tend to set forth groundless claims, with the hope of receiving a substantial settlement or treble damages. Such nuisance suits tend to increase defendants' costs.[48] Third, litigation itself, including pleading, discovery, developing legal strategy, and handling multi-district, multi-party, or class action litigation adds costs in seeking reparations.[49]

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44. *See id.* at 472. Page's primary concern is that the type of loss to society that should be the basis to a damage award frequently does not coincide with the type of injury to individual plaintiffs. For example, an award of "lost profits" to plaintiffs who were pricing above a fixed maximum price is an award which reflects the competitor's injury but may not reflect or in any way relate to injury to social welfare. *See id.* at 491. On the other hand, an award to plaintiffs of the overcharge levied or monopoly profit in a cartel price-fixing suit would be a proper remedy because the overcharge is related to social welfare loss, although here too, the private injury distinct from social cost. The cartel raised prices and restricted output, which led to "deadweight loss," i.e., the underproductive use of resources. The monopoly profits and deadweight loss flow from the same aspect of conduct. *Id.* at 479.

45. *See* Note, *supra* note 42.

> The motivation for imposing antitrust damages certainly should be to rectify injuries to society, but the proper means to prevent that social harm is to deter the producer by confiscating its gain to the extent that the gain results from inefficient exploitation. Consequently, antitrust damages for inefficient exploitative behavior should also deviate from . . . [the] objective of restoring the plaintiff to the status quo ante and should place the *defendant* in a position inferior . . . whenever the defendant benefits from engaging in behavior that imposes a net social cost. Therefore, optimal damages should not aim to prevent the transfer of income from consumers to exploitative monopolists, but to direct firms with market power to the form of exploitative behavior . . . that causes the least deadweight loss.

Id. at 340 n.42.

46. Page, *supra* note 42, at 472. Page notes that treble damages does not efficiently discount for the probability of apprehension. He does not, however, conclusively doubt "the suitability of the current statutory scheme for its [deterrent] purpose." *Id.* at 476.

47. K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 84-90 (1976).

48. *Id.* at 90-95.

49. *Id.* at 95. The costs of litigation, or "transaction costs" would likely exceed the costs of merely confiscating the monopoly rent of defendant. *See* Note, *supra* note 42, at 340 n.44.

The uncertainty of antitrust law is another ground for criticism.[50] Due to the law's complexity, a potential violator might have difficulty determining the parameters of antitrust law. In addition, a conscientious judge might be reluctant to award treble damages unless the violator's conduct is clearly unlawful. Judicial reluctance, aggravated by treble damages, seriously impedes the development of antitrust caselaw.

Although the treble damages remedy is the element that defendants "most fear,"[51] critics question whether treble damages actually deter antitrust violations. First, the quantitative value of the deterrence is difficult to measure. Not only is the quantity of undetected violations unknown, but the frequency with which antitrust violations are attacked cannot be satisfactorily determined.[52] Second, factors unrelated to antitrust law reduce the sting of treble damages to defendants. For example, the Internal Revenue Service allows a defendant to deduct treble damages as a business expense if the defendant has not also been convicted criminally for the violation.[53] Third, a jury may restrict the amount of damages, fearing that the treble damage award may be too harsh on the defendant.[54] Fourth, the private plaintiff may not bring a lawsuit, despite the attractive damage award, due to the considerable task of proving an antitrust violation.[55] Proof of an antitrust violation requires the ascertainment of illegal activity which necessitates complex investigation. For example, the plaintiff alleging unlawful conspiracy to monopolize under section 1 of the Sherman Act must show evidence of conscious parallelism in behavior among conspirators.[56] This requirement involves undertaking a complex investigation to determine the extent of economic interdependence of the parties and possible sources of parallel behavior. Fifth, the private plaintiff faces significant risks in undertaking litigation, such as the possibility of losing a beneficial relationship with a supplier whom he sues under the antitrust laws, the potential for protracted litigation, and the difficulty of the currently ambiguous standing require-

50. Professor Areeda describes antitrust law as a "seamless web." P. AREEDA, *supra* note 5, at 101; *see* 2 P. AREEDA & D. TURNER, *supra* note 12, ¶ 331b (1978); L. SULLIVAN, *supra* note 5, § 244.

51. Sims & Lawlor, *supra* note 6, at 40, col. 3; *see also Antitrust Enforcement Act of 1979: Hearings on S. 300 before the Senate Comm. on the Judiciary,* 96th Cong., 1st Sess. 12 (1979) (statements of Sen. Metzenbaum and Ass't. Attorney General Shenefield).

52. Wheeler, *Antitrust Treble-Damage Actions: Do They Work?,* 61 CALIF. L. REV. 1319, 1320-21 (1973).

53. I.R.C. § 162(g) (1982).

54. Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business,* 80 HARV. L. REV. 1566, 1569 (1967).

55. Wheeler, *supra* note 52, at 1329-32.

56. *See* L. SULLIVAN, *supra* note 5, § 110; Wheeler, *supra* note 52, at 1329-30. *See generally* Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-42 (1954); American Tobacco Co. v. United States, 328 U.S. 781, 808-10 (1946); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 212-13 (1939).

ments.[57] Sixth, some critics suggest that when the corporation pays treble damages, the true violator is not effectively deterred. Truly effective deterrence requires exacting payment from individuals or corporate management responsible for violations of the law. This alternative does not appeal to individual plaintiffs because corporate managers would be unable to pay an attractive damage award. In addition, the conviction of individuals may require higher standard of proof than the circumstantial evidence permitted in lawsuits against corporations.[58]

IV. Defending the Treble Damage Remedy

Since the treble damage remedy is an integral part of private plaintiff suits under the antitrust laws, the foregoing criticism has broad implications. If such criticism led to removal of the treble damage remedy without providing an adequate substitute, there would be fewer actions by private plaintiffs against antitrust violators because there would be little incentive for vigorously enforcing the law. Hence, the underlying purpose of treble damages, to ensure an adequate inducement for enforcement of antitrust laws, continues to exist. Indeed, a major impetus for this Note is the recognition of a possibility that Congress, imbued with deregulatory fever, may weaken the private plaintiff's position as "strongest pillar"[59] in antitrust law enforcement by doing away with his treble damage incentive.

A. The Benefits of Treble Damages

One criticism of the treble damage remedy is its failure to correct the cost to social welfare of an antitrust violation. A treble damage award corrects and compensates for the loss to a private plaintiff, which may be opposite to that of society. The remedy leaves the monopolist or successful plaintiff better off and society worse off, depending on whether the award undercorrects or overcorrects compared to the social cost of an antitrust violation.[60] This elemental inefficiency, however, is a fair price to society for individual undertaking of rigorous enforcement of antitrust laws, which benefits society as a whole.

The above tradeoff is necessary because antitrust policy favoring compensation of plaintiffs fundamentally differs from efficiency in the structuring of damage awards. Efficiency is strictly concerned with efficient deterrence.[61] The efficiency-based remedy does not appear to ade-

57. Wheeler, *supra* note 52, at 1330.

58. *Id.* at 1334.

59. Loevinger, *supra* note 5.

60. *See supra* notes 42-43 and accompanying text.

61. "Efficient deterrence" is distinct from the deterrence brought about by private treble damage litigation. The deterrence achieved under the threat of treble damage lawsuits is not efficient because it might discourage business behavior that is not technically violative of antitrust laws. In effect, treble damages-induced deterrence may amount to

quately ensure compensation which would induce private lawsuits.[62] First, the remedy would not be based necessarily on the injury suffered by the plaintiff who is in a position to initially ascertain the injury when the decision is made to proceed with a lawsuit. Second, the efficient remedy is multiplied by some unknown factor based on deterrence. It is not an automatic treble damage award. An efficient remedy requires a prospective plaintiff to make very complex determinations about productive efficiency, and factors of deterrence. This approach may be too complex and burdensome to ensure adequate compensation. Even if an efficient remedy ultimately provides "adequate" compensation to plaintiffs, the reward may not be apparent initially to a plaintiff and may cause a plaintiff to avoid antitrust litigation altogether. A private plaintiff enforcement system must ensure adequate compensation so that injured parties will participate.

Furthermore, an antitrust lawsuit involves an individual plaintiff seeking reparations for himself. Some legislative policymakers will be more concerned, as Senator Sherman was,[63] with the monetary amount an individual plaintiff recovers than the amount society benefits in an abstract economic sense.[64] Legislators are reluctant to take benefits away from their constituents.[65] Policymakers, including judges, will accept economic efficiency to the extent it streamlines and develops antitrust laws, and promotes economic progress, optimal allocation of resources, equitable distribution of income, and economic freedom.[66] But they will be less inclined to apply the theory to the individual's scenario. They will perceive the individual plaintiff to be faced with the concrete circumstance of suffering injury from an antitrust violation. To resolve the lawsuit, the

"overkill." Efficient deterrence theoretically deters only to the extent necessary to discourage particular anticompetitive behavior. It accomplishes degrees of deterrence based on the probability of apprehension, or the difficulty of detection of a violation. *See* Page, *supra* note 42, at 472-76.

62. *See infra* notes 115-16 and accompanying text.

63. *See supra* note 17 and accompanying text. Economic efficiency was not a fundamental policy concern when Congress passed the Sherman and Clayton Acts. *See* K. ELZINGA & W. BREIT, *supra* note 47, at 24 ("Economists played an insignificant role in early antitrust legislation"). *But see* R. BORK, *supra* note 12, at 20-21. "Wide discretion was delegated to the courts under the Sherman Act . . . but . . . the delegation was confined by the policy of advancing consumer welfare . . . . Sherman's draft outlawed arrangements designed, or which tend to advance, the cost to the consumer." *Id.* Bork would view efficiency as fundamental to ascertaining arrangements that tend to advance consumer welfare costs.

64. Dorman, *The Case for Compensation: Why Compensatory Components are Required for Efficient Antitrust Enforcement,* 68 GEO. L.J. 1113, 1117 (1980).

65. *Id.* Congressmen favoring deregulation, however, may be willing to restrict the rights of constituents. *See generally supra* note 6 and accompanying text.

66. *See generally* P. ASCH, ECONOMIC THEORY AND THE ANTITRUST DILEMMA 402 (1970). Professor Areeda acknowledges that efficiency is a "weak" formulation in some circumstances "because it ignores other values considered important by our society." P. AREEDA, *supra* note 5; *see also* L. SULLIVAN, *supra* note 5, § 1b.

judge will require explicit norms that are readily discernible as facts.[67] The efficiency analysis will be difficult to apply because many factual intricacies have not been resolved. The actual social cost of a violation may be one of the factual indeterminables, as is the factor of deterrence based on the seriousness of the antitrust violation. Efficiency may be effective as an approach to overall policy planning[68] and revamping substantive antitrust law regulations. It is less useful, however, in fashioning a damage award for the individual plaintiff who suffers competitive injury.[69]

There are other sources of inefficiency. The treble damage remedy encourages private plaintiffs to accumulate damages and not protect themselves from injury. It also encourages private plaintiffs to bring groundless lawsuits, and to incur substantial reparations costs in undertaking treble damage litigation. The plaintiff's incentive, however, to accumulate damages through the deliberate purchase of goods despite the existence of alternatives, is a problem related to proof of injury.[70] Because he must have made purchases from the antitrust violator in order to sue, a plaintiff can hardly avoid accumulating at least some damages.[71] The alternative is to dispense with private actions altogether in favor of fines levied by a public agency which would not accumulate damages to show injury. This alternative is undesirable for reasons that will be discussed below.[72] The prevalence of plaintiffs accumulating damages is not well documented.[73] The problems of bringing groundless lawsuits and suffering substantial reparation costs in handling private treble damage actions is common to all forms of litigation.

Actions brought for personal injury are frequently nuisance suits.[74] The increased costs of legal protection as a result of the proliferation of lawsuits is not attributable to treble damages but rather to the growth of litigation as a whole, including increases in the number of lawyers and business transactions, and to the growing litigiousness of society.[75] Be-

67. L. SULLIVAN, *supra* note 5, § 1b.

68. *Id.*

69. For a response to criticism of the economic approach to antitrust laws, see R. POSNER, *supra* note 41, § 2.3.

70. Hay, Book Review, 31 VAND. L. REV. 427, 433 (1978).

71. *Id.*

72. *See infra* notes 99-105 and accompanying text.

73. *See* Hay, *supra* note 70.

74. *See* Tyler, *supra* note 24, at 294-95.

75. *See Antitrust Enforcement Act of 1979: Hearings on S.300 before the Senate Comm. on the Judiciary,* 96th Cong., 1st Sess. 187 (1979). *But see* Block & Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?,* 68 GEO. L.J. 1131 (1980). "A private plaintiff's incentive to invest in antitrust litigation increases as the expected recovery increases. . . . If large penalties or damage multiples induce an excessive investment in private antitrust enforcement, Congress should limit the availability of private damages . . . ." *Id.* at 1133-34. *See generally* 1 P. AREEDA & D. TURNER, *supra* note 12, ¶ 331b; Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy,* 1978

cause the number of private treble damage actions filed has grown consistently with civil litigation as a whole,[76] the problem of proliferating litigation does not appear to be aggravated in private antitrust actions by the treble damage remedy. As long as public policy favors a private cause of action, nuisance suits and reparation costs will be a source of inefficiency.

The second major criticism involves the imposition of treble damages on defendants for engaging in conduct that, owing to the uncertainty of antitrust law, may not be readily apparent to defendants as unlawful. In circumstances where antitrust law contains much uncertainty, a judge is reluctant to place heavy, treble damage liability on defendants. Some fear that such judicial restraint impedes the development of antitrust law.[77]

This criticism has several weaknesses. First, Congress would be acting unfairly if it took away a compensatory right of a plaintiff in order to make the judge's work easier or to benefit the development of antitrust law in some other indirect way. Courts and judges exist to resolve disputes and to see that injured parties receive fair compensation. Second, that antitrust laws are complex and uncertain would seem to favor the plaintiff, who is substantially at risk in bringing a potentially expensive, protracted lawsuit with an uncertain outcome. On balance, the Supreme Court has accepted the view that the wrongdoer-defendant, rather than the plaintiff, should bear the risk of uncertainty which defendant's conduct has created,[78] provided the plaintiff can prove that he as been injured. A court should ensure an award to the plaintiff who undertakes a successful, but difficult lawsuit. Third, the judge should not

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DUKE L.J. 1353; Long, *Damages as an Instrument for Redirecting Antitrust Policy,* 7 CUM. L. REV. 413 (1977); Reich, *The Antitrust Industry,* 68 GEO. L.J. 1053 (1980). Reich estimates the total annual cost of inefficiency in antitrust litigation to be $2.5 billion. *Id.* at 1068.

In reply to the allegation that the private antitrust caseload is crowding up court dockets, the United States Supreme Court said:

> That may well be true but cannot be a controlling consideration here. We must take the statute as we find it. Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.

Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (emphasis original).

76. *See Antitrust Enforcement Act of 1979: Hearings on S.300 before the Senate Comm. on the Judiciary,* 96th Cong., 1st Sess. 187 (1979).

77. *See supra* note 50 and accompanying text.

78. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946). An example where the Supreme Court has favored the private plaintiff over the defendant involves the uncertainty of proving damages. The Court has allowed damages to be liberally construed. *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-63 (1931); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379 (1927); Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 23-24 (5th Cir.), *cert. denied,* 419 U.S. 987 (1974).

fear imposition of hardship upon a defendant even when an award of treble damages forces defendant out of business. Bankruptcy is not necessarily unfair or undesirable to society, because the productive assets may pass into hands likely to use the assets in a more competitive fashion.[79] Fourth, whether or not the remedy operates to hinder development of antitrust law may not be significant in light of more basic antidevelopmental problems. A major hindrance has been the problem of moving from a theory of competition to a policy of competition as reflected in antitrust law.[80] Economic theory does not provide "clear cut" answers.[81] In addition, the underlying objectives of the policy to promote competition conflict at times.[82] Perhaps the treble damage remedy rather than hindering the developmental process of antitrust law, indirectly forces judges to sharpen their examination of policy issues and theory. A remedy with less probable impact may not force a careful examination of the law of antitrust. Hence, the treble damage remedy is ultimately beneficial to the development of law.

A final criticism concerns whether the treble damage award actually deters behavior that violates antitrust laws. Payment of treble damages for violating antitrust laws can be an excessive burden to some defendants,[83] even though damages may be deducted on the corporation's tax return. The burden of undertaking private treble damage litigation is not aggravated by the existence of the remedy. Recovery of treble damages, attorneys fees, and other costs offset the difficulty of bringing an antitrust cause of action. To the extent that the remedy provides a powerful financial incentive for private action, treble damages enhances deterrence because the private plaintiff is in the best position to effectuate enforcement of antitrust laws. The private plaintiff is usually attuned to competition and monopolistic behavior in his product market,[84] since anticompetitive behavior directly affects his sales and profits. The private plaintiff is familiar with business markets, enabling him to better detect anticompetitive behavior. Because the private plaintiff is directly affected by having his economic livelihood on the line, he is more inclined to be a vigorous enforcer of the law.[85] Also, as an injured party

79. Tyler, *supra* note 24, at 288-89 (1978).

80. *See* P. ASCH, *supra* note 66, at 5; Schwartz, *An Overview of the Economics of Antitrust Enforcement,* 68 GEO. L.J. 1075, 1110 (1980); *see also* Illinois Brick Co. v. Illinois, 431 U.S. 720, 751-53 (1977) (Brennan, J., dissenting).

81. P. AREEDA, *supra* note 5, ¶ 105; *see* 1 P. AREEDA & D. TURNER, *supra* note 12, ¶ 113.

82. *See supra* note 38 and accompanying text.

83. 2 P. AREEDA & D. TURNER, *supra* note 12, ¶ 311a n.3; *see also* Tunney, *A View From the Senate,* 8 SW. U.L. REV. 510 (1976). "[T]he mere threat of a private antitrust suit by the chairman of British Petroleum was sufficient to cause Exxon to allow British Petroleum to enter the chase after Alaskan reserves." *Id.* at 511.

84. Ferber, *The Effectiveness of the Private Treble Damages Action as an Antitrust Enforcement Mechanism,* 8 SW. U.L. REV. 505, 507 (1976).

85. *See id.* at 507-09.

suing in his own interests for treble damages, the private plaintiff will be committed to antitrust enforcement. Although evidence is not available on the effectiveness of the treble damage remedy as a deterrent, the existence of vigorous detection and enforcement by injured private plaintiffs builds a strong justification for the remedy.

Despite the existence of treble damages, "[b]ig business has become bigger and bigger, [and] monopoly has flourished."[86] Some contend that this trend is not necessarily bad.[87] The trend raises the question of whether antitrust laws can effectively control concentrated economic power. When attainment of a competitive economy through antitrust regulation is beyond the law's ability, Congress and the courts should not consider elimination of treble damages. Instead, they should attend to the needs of the victims of anticompetitive behavior—the private plaintiffs—by removing procedural barriers.[88]

B. Standing of Private Antitrust Plaintiffs

Reducing the incentive for private antitrust litigants by limiting or curtailing the award of treble damages, may be undesirable for another reason. The requirement of antitrust standing, imposed by federal courts, has substantially limited the private plaintiff's ability to bring a cause of action.

Standing and damages are closely related under antitrust law. A plaintiff must allege an injury of the type that antitrust laws are designed to prevent.[89] Damages cannot be unduly speculative. The plaintiff must establish his damages at the commencement of his lawsuit, as either a consequence of direct injury to business or property, or injury within the target area. Proving damages, therefore, is an important prerequisite for bringing a lawsuit. In fact, some of the criticism which justified imposition of standing requirements could as well support restricting treble damages. For example, the avoidance of ruinous, windfall recoveries, and the reduction of administrative costs on the judicial system[90] are all-inclusive grounds to limit private plaintiff litigation.

The standing limitations imposed on the private plaintiff's cause of action are disturbing for two reasons. First, Congress intended section 4

86. Standard Oil Co. v. United States, 337 U.S. 293, 315 (1949) (Douglas, J., dissenting).

87. *See Report of the White House Task Force on Antitrust Policy,* 2 ANTITRUST L. & ECON. REV. 11, 54 (1968) (separate statement of R. Bork).

88. *See* Blecher, *The Only Game in Town,* 8 SW. U.L. REV. 550, 557 (1976).

89. *See supra* note 40 and accompanying text. Standing is closely related to the concept of antitrust injury. As one court stated: "The courts demand, either in terms of a standing doctrine or in terms of a requirement of *antitrust* damages, . . . that recovery be confined to those who have been injured by restraints imposed by defendants on competitive forces in the economy." Lupia v. Stella D'Oro Biscuit Co., 568 F.2d 1163, 1168 (7th Cir. 1978), *cert. denied,* 440 U.S. 982 (1979).

90. Tyler, *supra* note 24, at 286-94.

of the Clayton Act to provide an opening of "the door of justice to every man."[91] The Supreme Court, by upholding standing tests developed in lower courts, has disregarded this express policy. Second, the judiciary imposed standing limitations based on policy concerns that are more properly dealt with by the Congress.[92] For example, one reason for imposing standing limitations is the administrative burden resulting from numerous difficult and lengthy antitrust lawsuits. The judiciary contends that the burden on courts, and ultimately upon the public, should be limited. This argument, however, implies a political balancing of policy concerns. The language of section 4 of the Clayton Act indicates that Congress has already decided that the public should bear the burden imposed by private antitrust litigation.[93] Incidentally, similar innovative reasoning by the judiciary could have direct implications for the treble damage remedy. For example, despite the language of section 4 that private plaintiffs shall receive treble damages, Professors Areeda and Turner have suggested that the judiciary may deny treble damages to successful private plaintiffs in appropriate circumstances.[94]

C. Alternatives to the Treble Damage Remedy

Critics of the treble damage remedy have offered a variety of alternatives, ranging from dispensing with private causes of action entirely, to modifying the army of "private attorneys general"[95] into a force of "bounty hunters." There are three major alternatives. Kenneth G. Elzinga and William Breit recommend that Congress dispense wth private action in favor of heavy fines imposed by public enforcement agencies such as the Justice Department's Antitrust Division, and the Federal Trade Commission.[96] Professors Areeda and Turner propose that awarding treble damages be made discretionary.[97] The third alternative is based on efficiency. For plaintiff to recover damages, he must first show a negative effect on social welfare. The remedy is then multiplied by an agreed number designated as the degree of difficulty associated with detecting different types of violations. Thus, a damage award under this theory would be efficient deterrence.[98]

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91. *Supra* note 19 and accompanying text.

92. Tyler, *supra* note 24, at 292-94.

93. *Id.* at 294.

94. *See* 2 P. AREEDA & D. TURNER, *supra* note 12, ¶ 331b.

95. Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).

96. *See* K. ELZINGA & W. BREIT, *supra* note 47, at 112-48.

97. *See* 2 P. AREEDA & D. TURNER, *supra* note 12, ¶ 331b. ABA Section of Antitrust Law, *Mergers and the Private Antitrust Suit: The Private Enforcement of Section 7 of the Clayton Act: Policy and Law* 104 (ABA Monograph No. 1, 1977) (statement of Prof. Turner).

98. Note, *supra* note 42, at 351 n.66. The Note suggests that § 4 of the Clayton Act be redrafted to read (with deletions bracketed, and amendments italicized):

> Any person who shall be injured in his business or property by reason of anything in the antitrust laws may sue therefor . . . without regard to the amount in

1. The Public Enforcement Alternative

Elzinga and Breit have suggested leaving the job of enforcing the antitrust laws entirely to the public agencies. An obvious defect with this alternative is that it decreases detection and, consequently, deterrence. Elzinga and Breit maintain that threatening corporate violators with heavy financial penalties[99] would make up for the loss of private plaintiffs.

> As a first approximation to an optimal solution, a monetary fine should be levied that would be sufficient to deter most risk averse managers and that would enable society to achieve at least the present degree of deterrence at far less cost and a greater degree of deterrence at the same cost. Given this mandatory fine, the Antitrust Division and the Federal Trade Commission could then increase or decrease the amount of monopolistic activity by altering the amount of resources used in detecting and convicting antitrust violators.[100]

Although the public enforcement alternative seems attractive because theoretically it would provide deterrence at less social cost, it has drawbacks. First, it is dependent on the prevalence of "risk averse" attitudes among business executives. According to Elzinga and Breit, today's corporate executives are not the impetuous, swashbuckling, profit-maximizing entrepreneurs of a previous era. Instead, they are professional managers highly concerned with minimizing risk and uncertainty.[101] The threat of a large fine will frighten corporate directors into complying with the antitrust laws. Before altering the entire system of antitrust law enforcement, however, legislators should demand empirical certainty that the risk averse attitude is as ubiquitous as Elzinga and Breit assume. Even if the theory is correct, federal regulations as well as private and public enforcement of antitrust laws may have helped create the "risk averse" attitude among business executives. If the structure of antitrust enforcement changes significantly, attitudes might reverse to those of the pre-Sherman Act era.

In addition, the Justice Department and the FTC lack the economic

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controversy, and shall recover [threefold the damages by him sustained] *the larger of either*

(a) the defendant's profits attributable to the antitrust violation, divided by the court's estimate of the probability that the violation would be detected, or

(b) the plaintiff's actual injury,

and the cost of suit, including a reasonable attorney's fee. *The court shall rebuttably presume the probability of detection to be one-third.*

Id. The optional addition of "entire" to (a) enables the first plaintiff to confiscate all of monopoly rent of the defendant in one transaction. Thus, one private plaintiff, acting as "bounty hunter," would accomplish efficient deterrence, avoiding the inefficiency and expense of multiple private lawsuits by other injured individuals.

99. Criminal penalties are not realistic deterrents. *See* K. ELZINGA & W. BREIT, *supra* note 47, at 30-43.

100. *Id.* at 115.

101. *Id.* at 127-28.

incentives to vigorously enforce the law. Generally, their incentive is to maximize the self-interest of the staff at the expense of efficient antitrust enforcement.[102] Although staffs of public agencies do not profit financially from antitrust litigation, the staff's incentives include career advancement, and responding to the periodic demands of Congress.[103] Economic variables that provide the groundwork for selection of antitrust cases along parameters similar to the private plaintiff have little influence on the Antitrust Division.[104] These and other factors such as the increased temptation for dishonesty brought on by the greater threat of fines detract from the benefits of public enforcement.[105]

Another difficulty with the public enforcement alternative is its failure to compensate individual victims, as opposed to redressing society as a whole. Individuals who are substantially injured by antitrust violations generally will not understand the "efficiency" provided by exclusive public enforcement.

2. The Discretionary Remedy Alternative

The absence of discretion in awarding treble damages has troubled some judges.[106] If the treble damage award were discretionary, the judge could award treble damages only where it would be appropriate to compensate a plaintiff for his extra effort. A judge would determine the size of the award based on the nature of the evidence, including the hardship to the defendant, the obviousness and gravity of the offense, the notice defendant received, and considerations of what the situation would have been absent an antitrust violation.

A discretionary remedy, however, has two disadvantages. First, it dissipates the incentive for private parties to bring antitrust lawsuits. Without concrete assurance of a treble damage award, a potential litigant may not embark upon the considerably difficult task of seeking redress. Wealthy defendants' use of delay tactics, including attempts to force huge expenditures of money in discovery and pretrial maneuvers by plaintiff,[107] aggravate incentive problems. The difficulty with incentives may be acute in the instance of a class action; frequently the named plaintiff has substantial initial management costs.[108] Second, a discretionary remedy, like the rule of reason, involves balancing values, facts, and circumstances in fashioning a remedy that is equitable. The decision whether to award treble damages is not an easy determination. In the

102. *See* McChesney, *On the Economics of Antitrust Enforcement,* 68 GEO. L.J. 1103, 1108 (1980).
103. Schwartz, *supra* note 80, at 1093.
104. *See* Siegfried, *The Determinants of Antitrust Activity,* 18 J.L. & ECON. 559, 573 (1975).
105. *But see* K. ELZINGA & W. BREIT, *supra* note 47, at 116.
106. J. BURNS, *supra* note 32, at 30.
107. Tyler, *supra* note 24, at 293.
108. *See id.*

current debate on contribution legislation, opponents have raised concern that the new law will have the undesirable effect of making antitrust litigation more complex.[109] Therefore, a discretionary remedy would make antitrust litigation increasingly complex and conflict with express Supreme Court policy.[110]

3. The Efficient Remedy Alternative

In the interest of furthering economic efficiency in antitrust law, advocates of change have recommended that private awards should relate to social costs of antitrust violation.[111] Private awards also provide a means for deterring hard to detect unlawful activity by multiplying the damage award by the degree of likelihood that such a violation will be discovered and penalized. In particular, one approach would award the amount of monopoly rent,[112] rather than the cost of plaintiff's injury, except as an option in certain circumstances.[113] This damage award determination removes any gain a monopolist might receive from his unlawful behavior.[114] The amount of award, however, is discounted by the amount of any productive efficiency increase by the monopolist because the monopolist may create benefits to society through economies of scale. A reduction in efficiency is therefore a prerequisite to recovering any damages. Under this alternative, the multiple for any damage award is rebuttably presumed to be three.

A variation of this alternative recommends that the status of private litigant be that of a "bounty hunter," as opposed to the old status of "private attorney general." In place of any individual plaintiff's showing injury and seeking redress, this alternative provides for the bounty hunter litigant, as the first in line to obtain the entire profits of the defendant that are attributable to the violation. The reason for this variation is to avoid litigation costs involved in redressing the injury of each victim. The bounty hunter's reward also serves as an incentive.

As an alternative to mandatory treble damages, this remedy has two obvious problems. First, the remedy is a "windfall" to the bounty hunter plaintiff. Since antitrust violations typically have a wide range of direct and indirect effects, limiting a cause of action to a class of efficient enforcers, or bounty hunters, will undoubtedly be perceived as unfair to

109. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 731-32 (1977).

110. ABA Section of Antitrust Law, *Minority Report on Contribution,* 49 ANTITRUST L.J. 306 (1980).

111. *See supra* note 44.

112. Note, *supra* note 42, at 351 n.66.

113. *See id.* at 338. The monopoly rent is related to "deadweight loss," or the social cost, but it is not social cost. Monopoly rent represents the amount that consumers pay for monopoly goods in excess of the competitive price. It is a transfer of income from consumers to producers. "Deadweight loss" represents wasted resources resulting from the monopolist's restriction of output. *See id.* at 332-34.

114. *Id.* at 338.

other potential plaintiffs. In contrast, the treble damage system provides adequate compensation for parties injured by antitrust violations. The second problem is whether this remedy will operate to ensure to potential plaintiffs a significant award and encourage them to undertake their private cause of action. The efficient remedy only provides a rebuttable presumption that the multiple shall be trebled. The reason for this discretionary element is that efficient deterrence stipulates that a remedy should provide for different levels of deterrence[115] relative to the difficulty of detecting an antitrust violation and seeking redress. The degree of difficulty in detecting an antitrust violation is an ambiguous standard because it is not the same for all types of violations. Perhaps it is too ambiguous to assuage the fears of private plaintiffs faced with expensive antitrust litigation. Even with a similar violation, the degree of difficulty in detecting a violation will vary with the facts and circumstances. The sudden adoption of this alternative remedy without clearing up this ambiguous standard might create only inefficiency of a different sort. The cost of uncertainty—less private law enforcement of antitrust laws—would swamp the benefits of the change.[116]

V. CONCLUSION

Section 4 of the Clayton Act provides that any person may sue to recover damages for injury to business or property resulting from conduct prohibited under the antitrust laws. The private plaintiff has been described as the "strongest pillar" of antitrust enforcement.[117] The treble damage remedy is an integral component of the private plaintiff's cause of action because it induces private enforcement of the law by ensuring compensation to the successful litigation. The substantial damage award also operates to deter potential violators.

Although the purposes of the treble damage remedy are to compensate the injured and to deter violators, the overriding goal of antitrust law is preservation of a competitive economy. Critics recently have argued that the treble damage remedy may frustrate competition by failing to serve a related economic objective of improving overall social welfare. Efficiency provides a framework of analysis that redefines antitrust law to serve the improvement of social welfare. Efficiency, at least for now, as a goal is secondary to compensation for the plaintiff. When efficiency can be reconciled with compensation and inducement to action for all injured plaintiffs, a statutory change in the remedy may be appropriate. Inefficiencies of reparation costs for private action, however, will continue to be a problem.

The treble damage remedy has benefits which offset its undesirable

115. Schwartz, *supra* note 80, at 1098.
116. McChesney, *supra* note 102, at 1104.
117. Loevinger, *supra* note 5.

aspects. Although treble damages-induced litigation sometimes imposes hardship on defendants and the judiciary, these concerns have not sufficiently ripened into problems that support a change in the law. Furthermore, the desirability of retaining the treble damage remedy is reinforced by judicially-imposed standing limitations on antitrust plaintiffs. Standing has reduced deterrence brought about by private action, since fewer plaintiffs are able to seek redress. Similarly, removing the treble damage remedy without replacing it with other, adequate monetary inducements further dissipates enforcements by withdrawing the incentive for plaintiffs to undertake litigation.

The most serious issue is a political one. Congress, in its current mood, may try to free business from regulation, including the regulation brought on by the force of "private attorneys general." If so, one method of reducing this regulation is removal of an integral incentive, the treble damage remedy. The criticisms leveled at treble damages, including inefficiency, hardship on defendants, ineffective deterrence, and limiting substantive development of the law, provide fertile grounds for attack. Nevertheless, if private damage litigation is to survive and to continue to deter violations, further limitation must not be allowed.